

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-30356  
Summary Calendar

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DONALD J. KENNAIR, JR., and  
LETTIE KENNAIR,

Plaintiffs-Appellants,

versus

STATE FARM FIRE AND CASUALTY COMPANY,

Defendant-Appellee.

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Appeal from the United States District Court for the  
Eastern District of Louisiana  
(CA-93 1039-N)

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(December 27, 1994)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.\*

GARWOOD, Circuit Judge:

Plaintiffs-appellants Donald and Lettie Kennair appeal the district court's judgment, following a bench trial, in favor of defendant-appellee State Farm Fire & Casualty Co. (State Farm). We affirm.

**Facts and Proceedings Below**

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\* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

On January 4, 1992, a fire destroyed the Kennairs' home in Buras, Louisiana. The Kennairs sought to recover for their losses under their homeowner's insurance policy issued by State Farm. The parties stipulated that the policy was in effect at the time of the fire, and it is undisputed that the fire completely destroyed the Kennairs' home. On December 30, 1992, the Kennairs filed suit against State Farm in Louisiana state court, alleging bad faith based on State Farm's refusal to pay under the policy. State Farm raised the affirmative defense of arson. On March 29, 1993, State Farm removed the case to federal court on the basis of diversity jurisdiction. After a two-day bench trial in May of 1994, the district court found that State Farm had proved its defense of arson and dismissed the Kennairs' complaint with prejudice. The Kennairs filed a timely notice of appeal. Their sole complaint on appeal is the assertion that State Farm failed to prove they were responsible for the incendiary fire.

#### **Discussion**

Under the Louisiana law applicable in this diversity suit, arson is an affirmative defense against a claim for fire insurance proceeds. The defendant bears the burden of proving by a preponderance of the evidence that (1) the fire was of an incendiary origin, and (2) the plaintiff was responsible for setting the fire. *Sumrall v. Providence Washington Ins. Co.*, 60 So.2d 68, 69 (La. 1952); see also *Joubert v. Travelers Indem. Co.*, 736 F.2d 191, 193 (5th Cir. 1984) (applying Louisiana law). Because there are rarely eyewitnesses to the act of arson, the defendant may prove its case by circumstantial evidence and "a

finding for [the] defendant is warranted where the evidence is of such import that it will sustain no other reasonable hypothesis but that the claimant is responsible for the fire." *Sumrall*, 60 So.2d at 69. Proof of "motive, plus the incendiary origin of the fire, [is], in the absence of believable rebuttal evidence, . . . sufficient to sustain the affirmative defense [of arson]." *Id.* at 70; see also *Rist v. Commercial Union Ins. Co.*, 376 So.2d 113, 113-14 (1979). We review the district court's arson finding for clear error. *Kelly v. Commercial Union Insurance Co.*, 709 F.2d 973, 976 (5th Cir. 1983); *Security Ins. Co. of Hartford v. Dudds, Inc.*, 648 F.2d 273, 275 (5th Cir. 1981).

In their brief on appeal, the Kennairs do not challenge the district court's finding that the fire was of incendiary origin. Thus, the sole issue is whether there is sufficient evidence to support the district court's finding that the Kennairs were responsible for setting the fire. Although there is no direct evidence that the Kennairs were responsible for the fire, we find that there was sufficient circumstantial evidence in the record to support the district court's finding of arson. For example, Donald Kennair initially told investigators that he had no flammable liquids on the property, but at trial he admitted that he stored several gallons of diesel fuel in the shed behind his house. There was evidence that diesel fuel was used to set the fire, and had been scattered throughout the house. State Farm presented evidence that the Kennairs had a financial motive to burn their house. Before the fire, the Kennairs attempted to sell their house. Despite having invested more than \$80,000 in the house, the

Kennairs were forced to lower the asking price from \$50,000 to \$34,000.<sup>1</sup>

In addition, at the time of the fire, the Kennairs erroneously believed that their State Farm policy provided replacement cost coverage that would entitle them to almost \$64,000 if their house was destroyed by fire.<sup>2</sup> State Farm's accounting expert painted a dismal picture of the Kennairs' financial situation. Despite a positive monthly cash flow, the Kennairs repeatedly had checks returned for insufficient funds and were regularly late in making credit card payments. Finally, the district court relied on the fact that the Kennairs had removed almost all of their belongings from the house prior to the fire. We find that this evidence is sufficient to sustain the district court's finding that State Farm proved the motive element of the arson defense. The evidence also clearly shows that they had the opportunity to set the fire.

In sum, we hold that the district court's finding of arson was not clearly erroneous because the Kennairs conceded that the fire was of incendiary origin and there was ample evidence to support

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<sup>1</sup> At the time of the fire, the Kennairs' attorney was in the process of drafting a lease purchase agreement to transfer the house to Ioan Miac. According to the terms of this oral agreement, Miac was to make payments on the Kennairs' mortgage and help Donald Kennair build a new home. The district court expressed doubts as to whether this agreement would be executed, but it reasoned that even if it was, the Kennairs stood to lose almost all of the equity in their home.

<sup>2</sup> Both the Kennairs and State Farm initially believed that the Kennairs had a replacement value policy. However, at trial, State Farm discovered that the Kennairs' policy only provided reimbursement for the actual cash value of the damage caused by the fire. Thus, State Farm correctly observes that the Kennairs stood to gain substantially more money from their fire insurance policy than from the sale of their home.

the district court's finding of motive and opportunity.<sup>3</sup>

**Conclusion**

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

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<sup>3</sup> In an effort to rebut State Farm's motive evidence, the Kennairs suggested that someone may have set fire to their house in an effort to harm Miac. In support of this argument, the Kennairs stressed that Miac has known enemies, including someone convicted of attempting to kill him. Miac, however, had not moved into to the house at the time of the fire. Accordingly, the district court concluded that "[t]he evidence will not support any other reasonable hypothesis but that the Kennairs set fire to their home to collect the insurance proceeds." We agree.